Supreme Court, U.S.
FILED

112

No. (1) 08-648 NOV 13 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

JANICE BREWER,
in her official capacity as Secretary of State of Arizona,

Petitioner,

vs.

RALPH NADER and DONALD N. DAIEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General of Arizona
MARY R. O'GRADY*
Solicitor General
BARBARA A. BAILEY, *of counsel*
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
(602) 542-3333

**Counsel of Record* *Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Did the Ninth Circuit err in holding – in conflict with the Eighth Circuit – that Arizona's requirement that candidate nomination petition circulators be residents of the State was subject to strict scrutiny and failed to meet that standard under *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), in which the Court expressly left open the question?

Did the Ninth Circuit err in holding – in conflict with the Arizona Supreme Court – that Arizona's nomination petition filing deadline for independent presidential candidates is subject to strict scrutiny review under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), in absence of a showing that the filing deadline imposes any burden – severe or otherwise – on the candidate?

PARTIES TO THE PROCEEDING

The Respondents are the Plaintiff-Appellants Ralph Nader and Donald N. Daien. This petition refers to them collectively as "Respondents."

The Petitioner is the Defendant-Appellee Janice Brewer, Arizona Secretary of State. The petition refers to her as the "Secretary."

The Complaint also named as plaintiffs Peter Camejo and Kendle H. Greenlee, who were dismissed before summary judgment was granted in the district court and who were not parties to the appeal below. Dorothy Schultz intervened in the district court and was dismissed before summary judgment was granted. Intervenor Schultz was not a party to the appeal below.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	2
A. Material Facts	3
B. Course of Proceedings	6
Reasons for Granting the Writ	10
I. The Residency Requirement	10
A. The *Buckley* Court Expressly Left Open the Question Whether a Residency Requirement Is Constitutional	11
B. Federal Courts Have Reached Conflicting Decisions on Whether State Residency Requirements Are Subject to, or Survive, Strict Scrutiny	12
C. The Ninth Circuit Erred in Applying Strict Scrutiny to Arizona's Residency Requirement Where the Burden Was Not Shown to Be Severe	15
II. The Filing Deadline	20

TABLE OF CONTENTS – Continued

Page

A. The Ninth Circuit's Decision on the Constitutionality of Arizona's Candidate Filing Deadline Conflicts with the Decision of the Arizona Supreme Court on the Same Issue 20

B. The Ninth Circuit Erred in Deciding that Arizona's Filing Deadline Is Subject to Strict Scrutiny 22

Conclusion 26

APPENDIX A

July 9, 2008, Opinion of the Court of Appeals for the Ninth Circuit 1a

APPENDIX B

June 8, 2006, District Court Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment 1b

APPENDIX C

August 15, 2008, Order of the Court of Appeals for the Ninth Circuit Denying Petition for Panel Rehearing or Rehearing En Banc 1c

APPENDIX D

A.R.S. § 16-101 ..... 1d

A.R.S. § 16-311(A) 2d

A.R.S. § 16-321 ..... 2d

A.R.S. § 16-341 ..... 4d

TABLE OF AUTHORITIES

Page

CASES

American Constitutional Law Foundation, Inc. v. Meyer, 120 F.3d 1092 (10th Cir. 1997).....14

Anderson v. Celebrezze, 460 U.S. 780 (1983).....*passim*

Browne v. Bayless, 46 P.3d 416 (Ariz. 20y02)..20, 21, 22

Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999).....*passim*

Burdick v. Takushi, 504 U.S. 428 (1992).....16

Chandler v. City of Arvada, 292 F.3d 1236 (10th Cir. 2002).....13

Crawford v. Marion County Election Board, 128 S. Ct. 1610 (2008).....19, 20, 23

Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989).....18

Hart v. Sec'y of State, 715 A.2d 165 (Me. 1998).....14

Initiative & Referendum Institute v. Jaeger, 241 F.3d 614 (8th Cir. 2001).....9, 13, 14

Kean v. Clark, 56 F. Supp. 2d 719 (S.D. Miss. 1999).....14

Krislov v. Rednour, 226 F.3d 851 (7th Cir. 2000).....13

Lerman v. Bd. of Elections, 232 F.3d 135 (2d Cir. 2000).....14

Meyer v. Grant, 486 U.S. 414 (1988).....7, 13, 14

Morrill v. Weaver, 224 F. Supp. 2d 882 (E.D. Pa. 2002).....15

TABLE OF AUTHORITIES – Continued

Page

Nader v. Blackwell, No. 07-4350, ___ F.3d ___, 2008 WL 4722584 (6th Cir. Oct. 29, 2008).....13, 15

Nader v. Brewer, 531 F.3d 1028 (9th Cir. 2008).....*passim*

Nader v. Brewer, No. CV-04-1699-PHX-FJM, 2006 WL 1663032 (D. Ariz. June 8, 2006).....*passim*

Nader v. Brewer, 386 F.3d 1168 (9th Cir. 2004).....7

Purcell v. Gonzalez, 549 U.S. 1, 127 S. Ct. 5 (2006).....18

Storer v. Brown, 415 U.S. 724 (1974).....17, 23

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).....14, 16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I .....*passim*

STATUTES

A.R.S. § 16-101.....2, 4

A.R.S. § 16-201.....4

A.R.S. § 16-311(A).....2, 3

A.R.S. § 16-321.....2, 4

A.R.S. § 16-341.....2, 3

A.R.S. § 16-344(A).....3, 4

A.R.S. § 16-351(A).....4

A.R.S. § 16-461(A).....5

TABLE OF AUTHORITIES – Continued

Page

A.R.S. § 16-545(B) 5

28 U.S.C. § 1254(1) 1

OTHERS

Ariz. Sess. Laws 2007, Ch. 168, § 1 4

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported: *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008). It is included as Appendix A.

The decision of the district court is unreported: *Nader v. Brewer*, No. CV-04-1699-PHX-FJM, 2006 WL 1663032 (D. Ariz. June 8, 2006). It is included as Appendix B.

The order of the Ninth Circuit denying the petition for panel rehearing and for rehearing en banc is included as Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its panel decision on July 9, 2008. The Ninth Circuit denied Defendant-Appellee's Petition for Panel Rehearing or Rehearing En Banc on August 15, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Arizona Revised Statutes (A.R.S.) §§ 16-101, 16-311(A), 16-321, and 16-341 are set forth in Appendix D.

STATEMENT OF THE CASE

The Arizona Secretary of State asks the Court to grant certiorari to settle a dispute among the federal courts about whether state residency requirements for circulators of petitions are subject to, or survive, strict scrutiny review. The Secretary seeks review of the Ninth Circuit's holding that Arizona's requirement that petition circulators be qualified to register to vote in Arizona imposes a severe burden on speech and therefore is subject to strict scrutiny. The Court also should review, if necessary, the court of appeals' holding that Arizona's residency requirement is not narrowly tailored to achieve a compelling state interest.

The Secretary further asks the Court to grant certiorari to resolve a conflict resulting from a separate holding of the Ninth Circuit, which struck down Arizona's nomination petition filing deadline with regard to independent presidential candidates. The court of appeals' decision directly conflicts with a decision of the Arizona Supreme Court, which upheld

the requirement under the principles set forth by this Court in *Anderson*.

A. Material Facts.

In Arizona, candidates for any office have four options for getting on the ballot. One of those options is to run as an independent candidate. In the case of presidential candidates, the governing statutes include provisions that pertain to presidential electors, who, in turn, elect the candidate of their choice. A.R.S. § 16-341(G). Independent candidates must obtain signatures on nominating petitions to establish a modicum of support for their candidacy. Under Arizona law, the required number of signatures for presidential candidates is three percent of the number of registered voters who are not registered as members of a recognized political party. *Id.* § 16-341(E). In 2004, the number of signatures needed to support an independent presidential candidate was 14,694. (App. A at 5a.)

There is no limitation on when either independent or party candidates may begin collecting signatures for their nominations. They all must file their nominating papers at least ninety days, and no more than 120 days, before the primary election. A.R.S. §§ 16-341(C), 16-311(A), 16-344(A).[1] In 2004, that

[1] In the case of presidential electors, recognized parties are not required to obtain nomination signatures but instead must appoint candidates for the office of presidential elector and file

(Continued on following page)

filing deadline fell on June 9, 2004. (App. A at 6a.)[2] Signatures on nomination petitions must be those of registered voters. A.R.S. § 16-321(B). Those signatures must be verified by a person before whom they were written. *Id.* § 16-321(D). Any person may circulate nominating petitions to place his or her candidate of choice on the ballot; the signatures must be witnessed and verified, however, by a person qualified to register to vote. *See id.* To be qualified to register to vote in Arizona, a person must be, among other things, a resident of the State twenty-nine days preceding the election. *Id.* § 16-101.

Within ten court days after the filing deadlines, an elector may challenge the nominations. *See id.* § 16-351(A) (setting out the procedures for judicial challenges to nominations). Under those procedures, a judicial challenge may be heard and decided in the superior court within approximately four weeks after the filing deadline. *Id.* If the matter is appealed, the state supreme court must decide the matter "promptly." *Id.*

---

nomination papers for each candidate with the Secretary by the same deadline as for other candidates. A.R.S. § 16-344(A).

[2] The primary election fell on September 7, 2004, and the general election fell on November 2, 2004. (App. A at 6a.) At the time this case was brought, state law provided that the primary election date was to be held on the eighth Tuesday before the general election. *See* A.R.S. § 16-201 (2006). A 2007 amendment to that provision moved the State's primary election to the ninth Tuesday before the general election. *See* Ariz. Sess. Laws 2007, Ch. 168, § 1 (amending A.R.S. § 16-201).

Ballots must be printed and distributed in time for early voting, which begins thirty-three days before the general election. *See id.* § 16-545(B). Early voting for the general election began on September 30, 2004. (App. A at 6a.) Sample ballots must be printed no later than forty-five days before the election. A.R.S. § 16-461(A). In 2004, the deadline for proofing and finalizing the ballot for the general election was September 18, 2004. (App. A at 6a.) The special paper for the ballots is ordered well before the September proofing deadline, and the preparation of that ballot begins in August and is completed shortly after the primary election. (Dkt. 46, ex. 3, ¶¶ 10, 19.) The printing of the general election ballots is completed on a tight deadline, which also must incorporate time within which to translate the ballots into Spanish. (*Id.*, ¶ 14.) In 2004, the candidate filing deadline fell 113 days before voting began in the general election. (Dkt. 59 at 8 [App. B at 12b].)

Nader ran for President and was on the ballot in Arizona in 2000 as a third party candidate. (Dkt. 1 [Complaint], ¶ 5.) In 2004, Nader again sought to get on the Arizona ballot, this time as an independent presidential candidate. (App. B at 1b.) Although he announced his candidacy in February 2004, his campaign did not attempt to gather any signatures to support his candidacy until April. (*Id.* at 12b-13b.) His campaign gathered more than ninety percent of its signatures within the two-week period immediately preceding the June 9th deadline for filing nomination petitions. (*Id.* at 13b.) Shortly after he

filed his nomination petitions, Nader's nomination was challenged in the Arizona Superior Court of Maricopa County. (*Id.* at 1b-2b.) The challengers claimed that, of the approximately 21,185 signatures on the petitions filed by Nader, 15,467 of them were invalid. (App. B at 1b; dkt. 46, ex. 11, ¶¶ 112-113.) Nader withdrew his petitions based on his statement that he had failed to collect a sufficient number of signatures to place his name on the ballot. (App. B at 2b.) Nader withdrew his candidacy in Arizona on July 2, 2004. (App. A at 7a.)

B. Course of Proceedings.

On August 16, 2004, Nader, along with his vice-presidential running mate, a Texas elector, and an Arizona elector, sued the Secretary in this case under 42 U.S.C. § 1983 for alleged violations of the First and Fourteenth Amendments. (Dkt. 1 [Complaint], ¶¶ 1-6.) The plaintiffs challenged Arizona's law providing that nomination petitions for candidates, which include independent candidates for President, be filed no fewer than ninety days before the primary election. (*Id.*, ¶ 13 (citing A.R.S. § 16-311), ¶ 17.) The plaintiffs also challenged Arizona's law providing that only persons qualified to register to vote in Arizona (and who therefore were residents of the State) are permitted to verify nomination petition signatures. (*Id.*, ¶¶ 14-16.)

The plaintiffs sought a preliminary injunction to order that Nader's name be placed on the Arizona

ballot as a presidential candidate for the 2004 election. (*Id.* at 11-12, ¶¶ (2), (3).) The district court denied the preliminary injunction and the 2004 election proceeded without Nader as a candidate in Arizona. The Ninth Circuit affirmed that order. *Nader v. Brewer*, 386 F.3d 1168 (9th Cir. 2004). Following the preliminary injunction proceedings, two of the plaintiffs – the vice-presidential candidate and the Texas elector – sought and were granted dismissal from the case. (Dkt. 44.) The remaining parties subsequently filed cross-motions for summary judgment. (Dkt. 45, 47.) The district court denied Nader's motion and granted the Secretary's motion on June 8, 2006. (App. B.)

The district court reviewed the filing deadline and circulator residency requirements under the principles set forth in *Anderson* and *Meyer v. Grant*, 486 U.S. 414 (1988). The court acknowledged that circulating petitions for ballot access involves "core political speech" under *Meyer*. (App. B at 5b.) The court further explained that *Anderson* requires courts to review ballot access regulations by weighing the "character and magnitude of the asserted injury" to the plaintiffs' rights against the "precise interests put forward by the State as justifications" for the burden imposed. (*Id.* at 5b-6b (*quoting Anderson*, 460 U.S. at 789).) The court also noted that only severe restrictions on First Amendment freedoms are subject to strict scrutiny; whereas slight burdens should generally be upheld if rationally related to a legitimate interest. *Id.* at 6b.

The district court initially noted that Nader failed to offer any evidence to establish the significance of the burden imposed by either the residency requirement or the filing deadline. (*Id.* at 2b n.1.) The court also noted that, given that independent candidates have access to approximately 3.7 million Arizona residents who are eligible to circulate petitions, any burden on the rights of Nader or his supporters was limited and justified by the State's compelling interest in protecting the integrity of the election process. (*Id.* at 9b.) Even under a strict scrutiny review, however, which would have been warranted had Nader shown a severe burden, the district court found that both of the challenged regulations were narrowly tailored to achieve the State's compelling interests. (*Id.* at 8b-13b.) With regard to the requirement that individuals who verify petition signatures be state residents, the court found that Arizona had a compelling interest in protecting the petition circulation process from fraud and abuse and that the residency requirement ensures that circulators would be subject to the State's subpoena power to achieve that interest. (*Id.* at 8b-9b.) The court also found that Arizona's filing deadline was not more burdensome than necessary to achieve the State's compelling interest in allowing sufficient time to hear and resolve challenges to nominations and to print and distribute ballots in time for early voting. (*Id.* at 13b.)

The Ninth Circuit reversed. (App. A.) The court held that the circulator residency requirement imposed a severe burden as a matter of law under

Buckley because it necessarily decreased the number of potential circulators. (App. A at 16a.) The court acknowledged that the *Buckley* Court "expressly did not decide the validity of the separate residency requirement because it was not challenged in that case." (App. A at 15a.) The court further acknowledged that the Eighth Circuit "came to the opposite conclusion [from that of the Ninth Circuit] and upheld a residency requirement for initiative-petition circulators" in *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). (App. A at 18a.) The Ninth Circuit held that the residency requirement did not withstand strict scrutiny because it found that the requirement was not narrowly tailored to achieve the State's interest of preventing fraud in the petition circulating process. (App. A at 20a.)

With regard to the filing deadline, the Ninth Circuit held that *Anderson* was controlling on the issue of the severity of the burden on Nader's rights and required a finding of a severe burden. (App. A at 22a.) The court further held that the absence of any independent presidential candidate on Arizona's ballot since 1993, when the filing deadline was shortened to seventy-five days before the primary election, "suggests that the regulations impose a severe burden that has impeded ballot access." *Id.* Accordingly, the Ninth Circuit applied strict scrutiny to the filing deadline requirement and held that the State did not show that it needed all of the statutorily allotted time to achieve the State's interest of preparing and

distributing ballots in time for the general election. (App. A at 24a-25a.)

Although not part of the record before the courts below, Nader successfully sought to get on Arizona's ballot as an independent presidential candidate in the 2008 general election.

REASONS FOR GRANTING THE WRIT

I. The Residency Requirement.

The Court should grant certiorari to resolve the conflict among circuits about whether state residency requirements for petition circulators are subject to strict scrutiny and, if so, whether those requirements withstand such scrutiny. In *Buckley*, the Court applied strict scrutiny to, and struck down, Colorado's requirement that circulators of initiative petitions be registered to vote. *Buckley*, 525 U.S. at 192 & n.12, 195. The Court expressly left open the question whether a requirement that such circulators be state residents is subject to the same scrutiny or whether it would withstand such review if strict scrutiny were applied. *Id.* at 197.

Since *Buckley*, both federal district and appellate courts and state courts have addressed the question left open in that case. The courts have reached differing conclusions regarding the appropriate standard of review of restrictions on the residency of petition circulators and whether such a requirement survives

strict scrutiny. That disagreement results in some States, but not others, being permitted to prevent fraud in the petition process by requiring that those who attest to the validity of the signatures on the petitions be state residents and thus be subject to the State's subpoena power.

The Ninth Circuit erred by holding that strict scrutiny must be applied to Arizona's residency requirement without evaluating the magnitude of the burden imposed by the requirement on Nader or his supporters.

A. The *Buckley* Court Expressly Left Open the Question Whether a Residency Requirement Is Constitutional.

In *Buckley*, the Court left open the question whether a requirement that individuals who circulate petitions be state residents is subject to strict scrutiny or would survive such scrutiny. The Court stated:

> In sum, assuming that a residence requirement would be upheld as a needful integrity-policing measure – a question we, like the Tenth Circuit, see 120 F.3d, at 1100, have no occasion to decide because the parties have not placed the matter of residence at issue – the added registration requirement is not warranted.

Buckley, 525 U.S. at 197.

In his concurring opinion, Justice Thomas stated that he assumed, as did the Tenth Circuit, "that the

State has a compelling interest in ensuring that all circulators are residents." *Buckley*, 525 U.S. at 211. He further stated that Colorado's voter registration requirement was not narrowly tailored because many Colorado residents were not registered voters "and the State's asserted interest could be more precisely achieved through a residency requirement." *Id.*

The Court thus not only left open the issue of the constitutionality of a state residency requirement for petition circulators, but suggested that such a requirement may be upheld as a "needful integrity-policing measure." *Id.* at 197, 211. Particularly given the split among federal courts that have addressed the issue, the Court now should decide the question left open in *Buckley*.

B. Federal Courts Have Reached Conflicting Decisions on Whether State Residency Requirements Are Subject to, or Survive, Strict Scrutiny.

The Ninth Circuit held that, although *Buckley* did not decide the constitutionality of petition circulator residency requirements, strict scrutiny of such a requirement was "mandated" by *Buckley* because the requirement necessarily reduced the number of individuals eligible to circulate petitions for a presidential candidate in Arizona. (App. A at 16a.) The Ninth Circuit disagreed with the district court's analysis, which weighed the severity of the burden

shown by the challenger against the interests of the State and justifications for the regulation.

The Ninth Circuit's decision deepens an existing circuit conflict on the issue of the constitutionality of state residency requirements. Like the Ninth Circuit, the Seventh Circuit applied strict scrutiny to, and invalidated, an in-district residency requirement for petition circulators that operated as a state residency requirement in a statewide race. *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). The Tenth Circuit similarly applied strict scrutiny to a municipal residency requirement for petition circulators under the reasoning of *Buckley* and *Meyer*. *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). The *Chandler* court, however, acknowledged that the constitutionality of a state residency requirement was not the issue before it. *Chandler*, 292 F.3d at 1244.

Since the Ninth Circuit's decision, the Sixth Circuit applied strict scrutiny to, and invalidated, an Ohio law that, as applied, required that circulators of candidate nomination petitions be registered voters and Ohio residents. *Nader v. Blackwell*, No. 07-4350, ___ F.3d ___, 2008 WL 4722584 (6th Cir. Oct. 29, 2008). The court found that the residency requirement served no compelling state interest. *Id.* at *14.

The Eighth Circuit took a different approach and reached the opposite conclusion in *Jaeger*, which addressed North Dakota's state residency requirement for petition circulators. The *Jaeger* court upheld the requirement under *Buckley* because the

requirement did not "unduly hinder the circulation of petitions" and was a reasonable regulation designed to ensure the integrity of the petition circulating process. *Jaeger*, 241 F.3d at 615. In so holding, the *Jaeger* court followed the Supreme Court's "flexible" standard that applies strict scrutiny only where a severe burden has been shown and applies a lower level of scrutiny where "lesser burdens" are shown. *Id.* at 616 (*citing Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997)).

The Second Circuit applied strict scrutiny to, and struck down, a New York local residency requirement for nomination petition circulators. *Lerman v. Bd. of Elections*, 232 F.3d 135, 146-50 (2d Cir. 2000). The court stated, however, that the state's interest protecting the integrity of the signature collection process was served by the "less burdensome requirement[]" of a state residency requirement. *Id.* at 150.

Other courts either have upheld state residency requirements or have suggested that such requirements may be constitutional under *Buckley*. *See Hart v. Sec'y of State*, 715 A.2d 165, 167-68 (Me. 1998) (upholding a state residency requirement for petition circulators against a First Amendment challenge and analyzing the effect of *Meyer* and *American Constitutional Law Foundation, Inc. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), *aff'd by Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999)); *Kean v. Clark*, 56 F. Supp. 2d 719, 730-33 (S.D. Miss. 1999) (applying strict scrutiny to, and upholding,

Mississippi's state residency requirement for initiative petition circulators); *Morrill v. Weaver*, 224 F. Supp. 2d 882, 904 (E.D. Pa. 2002) (holding an in-district residency requirement unconstitutional but suggesting that a state residency requirement may be constitutional).

As the Sixth Circuit noted in *Nader v. Blackwell*, "sister circuits have heeded the Court's warning against litmus-paper tests, have carefully examined any challenged residency and registration requirements, and have divided as to their constitutionality." 2008 WL 4722584, at *15. The Court should resolve the residency requirement issue at this time.

C. The Ninth Circuit Erred in Applying Strict Scrutiny to Arizona's Residency Requirement Where the Burden Was Not Shown to Be Severe.

The Ninth Circuit reasoned that Arizona's residency requirement created a severe burden on Nader's speech and associational rights because there was a smaller pool of potential circulators as a result of the requirement. (App. A at 16a.) Thus, according to the court, the residency requirement would limit the size of the audience that could hear the proponents' message. (App. A at 15a.) Accordingly, the court applied strict scrutiny and held that, although the State had a compelling interest in preventing election fraud and ensuring the integrity of elections, the

residency requirement was not narrowly tailored to achieve that interest. (App. A at 18a-20a.)

The Ninth Circuit should not have applied strict scrutiny because there was no evidence that the residency requirement imposed a severe burden (or, indeed, *any* burden) on the rights of Nader or his supporters. *Buckley* does not require strict scrutiny of a requirement any time that requirement results in a smaller number of potential petition circulators, no matter how large the existing pool of circulators and no matter whether the restriction, in fact, severely burdens the challengers' ability to convey their message. Instead, review of a restriction such as the state residency requirement should include consideration of the extent of the available pool of circulators and the extent to which the requirement reasonably affects the challengers' ability to communicate their message or to gain access to the ballot.

Such an approach would be consistent with the Court's decisions in cases involving candidates' speech and association rights and those of their supporters. *See, e.g.*, *Timmons*, 520 U.S. at 358 (stating that the court weighs the character and magnitude of the burden imposed by the state regulation against the interests put forward by the state for the burden, and noting that lesser burdens are subject to less exacting scrutiny); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (same); *Anderson*, 460 U.S. at 789 (stating that only after weighing the character and magnitude of the asserted injury to the challenger's constitutional rights against the interests put

forward by the state as justifications for the law can a court decide whether the challenged law is constitutional); *cf. Buckley*, 525 U.S. at 192 ("We have several times said 'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'") (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Although the *Buckley* Court applied strict scrutiny to Colorado's registration requirement, it did so after finding that many thousands of the state's residents would be prohibited from circulating petitions for initiatives within their state. The challengers in *Buckley* had offered evidence that "large numbers" of those who were willing to circulate initiative petitions in Colorado on behalf of the challengers were not registered to vote. *Buckley*, 525 U.S. at 194.

Unlike the law at issue in *Buckley*, Arizona's residency requirement permits every Arizona citizen, who is otherwise eligible to register to vote, to verify petition signatures. Nader never made any showing that the residency requirement restricted his ability to garner supporters willing to convey his message to the citizens of Arizona in support of his candidacy. Neither did he make any showing that the residency requirement hindered his ability to gain access to Arizona's ballot or to associate with his supporters. Indeed, Nader succeeded in making the 2008 Arizona ballot. Respondents did not even offer any evidence in the district court of a single individual who desired to

circulate petitions for Nader but who could not do so because of the residency requirement. Although Nader argued that he would be prohibited from circulating petitions for his own candidacy, he never offered any evidence that he or any other non-Arizona resident would do so but for the restriction. The Ninth Circuit's *per se* rule that any decrease in the number of potential circulators mandates the application of strict scrutiny is not required by *Buckley* and is not consistent with the Court's jurisprudence on review of state election regulation.

Even if strict scrutiny were the appropriate standard of review of this integrity-policing measure, the Ninth Circuit erred in concluding that the residency requirement did not withstand that review. The Ninth Circuit recognized Arizona's compelling interest in protecting the integrity of the petition circulating process to prevent fraud. (App. A at 18a); *accord Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006) ("'A State indisputably has a compelling interest in preserving the integrity of its election process.'") (*quoting Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). The Ninth Circuit erred, however, in holding that Arizona's residency requirement was not narrowly tailored to achieve the State's interest in preventing petition circulator fraud.

The State demonstrated that the residency requirement was necessary to ensure that individuals who verified petition signatures would be subject to the State's subpoena power in the event such

individuals were necessary to nomination challenge proceedings. The Ninth Circuit did not question that the residency requirement served the State's purpose. Instead, the Ninth Circuit speculated that the State could meet its purpose by requiring individuals who verify petition signatures to consent to jurisdiction in Arizona. (App. A at 18a-19a.) No evidence supports such conclusion, however. Arizona's nomination challenge proceedings take place within a very short time period after the nomination petition filing deadline. Without the ability to subpoena individuals to appear in the state court, within days of service of a subpoena, the State cannot ensure that such individuals will be compelled to appear and be examined regarding the validity of signatures or the circumstances of the verification of nomination petitions. There was no evidence that requiring out-of-state individuals to submit to jurisdiction in Arizona would have ensured that the State could locate and subpoena them and compel their appearance within days in an Arizona court proceeding.

The Ninth Circuit also noted that the State failed to "contend that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents." (App. A at 20a.) The Ninth Circuit thus disregarded the evidence of petition circulation fraud in Arizona, because the record did not link such fraud to out-of-state circulators. (See dkt. 46, ex. 10.) The Ninth Circuit's approach, however, is contrary to the Court's decision in *Crawford v. Marion County Election*

Board, 128 S. Ct. 1610 (2008). In *Crawford*, the Court upheld Indiana's prophylactic measures to prevent in-person voter fraud at the polls, even though there was no evidence of any history of in-person voter fraud in Indiana. *Crawford*, 128 S. Ct. at 1613, 1618-19. Instead, the only evidence of historical voter fraud in Indiana existed in the context of absentee balloting. *Id.* at 1619. The Court nonetheless upheld Indiana's interest in enacting measures to prevent in-person fraud, rather than waiting for such fraud to occur or be detected. *Id.* at 1623-24. In light of the principles set out in *Crawford*, the court erred in requiring the State to prove specific instances of out-of-state circulator fraud.

II. The Filing Deadline.

A. The Ninth Circuit's Decision on the Constitutionality of Arizona's Candidate Filing Deadline Conflicts with the Decision of the Arizona Supreme Court on the Same Issue.

The Ninth Circuit's holding that Arizona's nomination petition deadline is unconstitutional directly conflicts with the holding of the Arizona Supreme Court in *Browne v. Bayless*, 46 P.3d 416 (Ariz.), *cert. denied*, 537 U.S. 1088 (2002). Although the Ninth Circuit did not distinguish or even mention *Browne*, that court addressed the constitutionality of, and upheld, Arizona's requirement that independent presidential candidates (as other candidates) file their

nomination petitions no fewer than ninety days before the primary election. *Browne*, 46 P.3d at 417.

Like the Ninth Circuit panel, the *Browne* court analyzed the constitutionality of Arizona's filing deadline under the principles and holding of *Anderson*. Contrary to the Ninth Circuit's holding and analysis, however, the *Browne* court held that strict scrutiny was not appropriate under *Anderson*'s reasoning because any burden imposed by the filing deadline on the rights of independent voters was not severe. *Id.* at 419. The *Browne* court's conclusion was based on the court's findings that the deadline in Arizona was significantly closer to the date for voting in the general election and that "the national political process has evolved toward a system of ever-earlier presidential primary elections," which results in an earlier determination of the identities and positions of the major party candidates. *Id.* Thus, the court determined that, under Arizona's filing deadline, independent voters would have sufficient time to coalesce around a viable independent candidate. *Id.*

Because the filing deadline did not severely burden the rights of independent voters, the court held, the requirement was constitutional if it was reasonable and nondiscriminatory. *Id.* at 420. The court held that the filing deadline requirement met that standard and was rationally related to the State's important regulatory interests in conducting fair and orderly elections. *Id.* The filing deadline served those interests by affording sufficient time to prepare and print early ballots, distribute overseas

ballots, translate ballots into other languages, and complete judicial review of election challenges. *See id.* at 419-20.

B. The Ninth Circuit Erred in Deciding that Arizona's Filing Deadline Is Subject to Strict Scrutiny.

The Ninth Circuit based its determination that the filing deadline imposed a severe burden on Nader, which in turn triggered strict scrutiny, on two grounds. First, the court found that *Anderson* mandated a finding of a severe burden. Second, the court believed that Arizona's historical experience, in which no independent presidential candidates have been on the State's ballot since 1993, "suggests that the regulations impose a severe burden that has impeded ballot access." (App. A at 22a.) Neither of those grounds is supported by *Anderson*.

Anderson involved a challenge to Ohio's independent candidate filing deadline, which in 1980 fell on March 20th – 229 days before the general election. *Anderson*, 460 U.S. at 783 n.1. The Court did not purport to apply strict scrutiny to the filing deadline at issue in *Anderson*. Instead, the Court first "consider[ed] the character and magnitude of the asserted injury" to First and Fourteenth Amendment rights, and then evaluated "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* at 789. There was no dispute that Ohio's filing deadline burdened Anderson's ability to

be a candidate because the filing deadline predated his announcement of his candidacy and he obtained and submitted the requisite number of signatures after the filing deadline. *Id.* at 782.[3]

The Court recognized that "'as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* at 788 (*quoting Storer*, 415 U.S. at 730). The Court stated that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* Although the *Anderson* Court struck down Ohio's filing deadline, it did so only after weighing the burden on Anderson and his supporters against the state interests put forward as justifications for the filing deadline. *Id.* at 796-806.

The Ninth Circuit began its analysis by noting that the *Anderson* Court "concluded that none of the state's asserted interests justified the 'extent and nature' of the burden imposed by the March filing deadline." (App. A at 21a.) From that accurate, but unremarkable, observation, the Ninth Circuit concluded that Arizona's filing deadline necessarily

---

[3] This Court has consistently required challengers to bear the burden of showing that the restriction at issue burdens them. *See, e.g.*, *Crawford*, 128 S. Ct. at 1623 ("[O]n the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters.").

imposed a severe burden because "*Anderson* remains binding Supreme Court authority." (App. A at 22a.) But the Ninth Circuit did not undertake to do what *Anderson* requires – to weigh the nature and magnitude of the injury caused by the challenged restriction against the interests put forward by the State – before concluding that there was a severe burden imposed on Nader's rights. Instead, the court began with the notion that the ultimate outcome in *Anderson* required a finding of a severe burden and the application of strict scrutiny. Based on that faulty premise, the court believed that unless the State could demonstrate the need for precisely 113 days between the candidate filing deadline and the start of early voting in the general election, such a requirement could not be constitutional.

Unlike the filing deadline struck down in *Anderson*, which fell twice as many days before voting in the general election as Arizona's filing deadline in 2004, Arizona's deadline is necessary to accommodate the State's interests in conducting fair and efficient elections. Those interests include allowing sufficient time for the candidate nomination challenge process and the translating, printing and distributing of the ballots in accordance with state law requirements for early voting. In contrast, the *Anderson* Court specifically noted that "Ohio [did] not suggest that the March deadline [was] necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed." *Anderson*, 460 U.S. at 800. In this case, the State

supported its interests with evidence – which was unrebutted before the district court – establishing the need for its June filing deadline.

And unlike Anderson's demonstration that Ohio's deadline burdened his ability to be a candidate, neither Nader nor his supporters made a showing of any burden, severe or otherwise, that was imposed on their First Amendment freedoms by Arizona's filing deadline. The district court found, and the Ninth Circuit did not disagree, that the filing deadline was not the reason for Nader's failure to get on the ballot. Instead, despite having announced his candidacy for President in February 2004, his campaign did not attempt to collect any signatures until April 2004 and, in fact, waited until two weeks before the deadline to collect the vast majority of those signatures. (App. B at 12b-13b.) Nader voluntarily withdrew his petitions based on his assertion that he had not collected a sufficient number of valid signatures. (*Id.* at 2b.)

Thus, in holding that the filing deadline as applied to independent presidential candidates imposed a "severe burden" on Nader's rights, the Ninth Circuit implicitly ruled that no showing of any actual burden on the challenger was necessary. Because such a holding contradicts the principles set out in *Anderson* and its progeny, the Court should grant certiorari to resolve the conflict created by the Ninth Circuit's decision.

CONCLUSION

The Court should grant this petition for certiorari.

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona
MARY R. O'GRADY*
Solicitor General
BARBARA A. BAILEY, *of counsel*
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007-2926
(602) 542-3333

**Counsel of Record* *Counsel for Petitioner*

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RALPH NADER; DONALD N. DAIEN, *Plaintiffs-Appellants*, v. JANICE BREWER, in her official capacity as Secretary of State of Arizona, *Defendant-Appellee.*	No. 06-16251 D.C. No. CV-04-01699-FJM OPINION

Appeal from the United States District Court
for the District of Arizona
Frederick J. Martone, District Judge, Presiding

Argued and Submitted
April 15, 2008 – San Francisco, California

Filed July 9, 2008

Before: Mary M. Schroeder, Richard R. Clifton, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Robert E. Barnes, Milwaukee, Wisconsin, for plaintiffs-appellants Ralph Nader, et al.

Barbara A. Bailey, Phoenix, Arizona, for defendant-appellee Janice Brewer, et al.

OPINION

SCHROEDER, Circuit Judge,

Introduction

Ralph Nader and one of his supporters in Arizona, Donald Daien (collectively, "plaintiffs"), appeal from the district court's grant of summary judgment to Janice Brewer, the Secretary of State of Arizona. Plaintiffs alleged that two provisions of Arizona's statutory election scheme – the requirement that circulators of nomination petitions be residents of Arizona and the requirement that nomination petitions be filed at least 90 days before the primary election – violated their rights to political speech and association under the First and Fourteenth Amendments. The case arose from Nader's efforts to appear on the 2004 Arizona general – election ballot as a presidential candidate. The district court upheld both petition requirements, holding that the burdens imposed on the exercise of plaintiffs' rights were not significant and were sufficiently justified by the state's interests.

The district court measured the burdens in terms of the effect the requirements had on Nader's ability to get on the Arizona ballot. The court held that these requirements were not a material cause of Nader's

failure to get on the ballot in 2004 and the burdens were therefore minimal.

In this appeal Nader stresses that the burdens of the residency requirement should be measured in terms of the effect the requirement has on the rights of persons like himself who live outside Arizona and wish to circulate petitions in that state. Controlling Supreme Court authority and a persuasive opinion of the Seventh Circuit support Nader's position. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000). Controlling Supreme Court authority also requires us to hold that the burdens imposed by Arizona's early filing requirement are severe and must be supported by compelling interests. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Neither the district court nor this court has had the benefit of much documentation of the state's needs for the requirements. We conclude, on the basis of this record, when examined after the passage of the considerable amount of time expended completing the appellate process, that the burdens are significant and that the state has not shown the requirements are sufficiently narrowly tailored to further compelling interests.

I. Background

Ralph Nader, a resident of Connecticut, announced his independent candidacy for President of the United States on February 22, 2004. Donald

Daien is one of Nader's supporters and is a registered voter in Arizona who wanted to vote for Nader and to serve as a presidential elector on Nader's behalf. Nader and Daien, along with other supporters, brought this action in August 2004 against Secretary of State Brewer, alleging that the residency requirement and the early filing deadline severely burdened the rights of expressive association and political speech of political candidates, potential petition circulators, and voters, in violation of the First and Fourteenth Amendments. They sought declaratory and injunctive relief.

A. Arizona's Nomination-Petition System

In Arizona, a person who is not a member of a recognized political party may gain a place on the ballot by filing nomination petitions containing a prescribed number of signatures. Ariz. Rev. Stat. § 16-341(C), (E), (F), (I). The petitions are filed for the office of presidential elector rather than for the presidential candidate; the petitions designate the presidential candidate and the names of ten individuals who would serve as electors for that candidate. *Id.* § 16-341(G), (H).

The same statute establishes the total number of signatures required for each political office, which is 3% of the registered voters in the political subdivision for which the candidate is nominated, who are not members of recognized political parties. *Id.* § 16-341(E), (F). Each signature must be witnessed by the

petition circulator. *Id.* § 16-321(D). In 2004, the number of signatures required for the office of presidential elector in Arizona was 14,694.

Only persons qualified to register to vote in Arizona can circulate petitions. *Id.* §§ 16-101, 16-321(D). In order to be qualified to register to vote, a person must, among other things, be a resident of Arizona and must have been a resident at least twenty-nine days before the election ("the residency requirement"). *Id.* § 16-101(A)(3). Under this statutory limitation, all non-residents of Arizona, including Nader himself, are prohibited from circulating petitions in support of Nader's candidacy.

Nomination petitions must be filed with the Secretary of State's office no later than 90 days before the primary election ("the filing deadline"). *Id.* §§ 16-311(A), (E), 16-341(C). This places the filing deadline 146 days before the general election. In 2004, the general election was held on November 2, the primary election was held on September 7, and the filing deadline was June 9.

An Arizona registered voter may challenge the validity of a candidate's petitions by bringing an action in superior court. *Id.* § 16-351. Such action must be brought within ten business days of the filing deadline, and the superior court must hear and decide the action within ten calendar days of its filing. *Id.* § 16-351(A). The decision is appealable only to the Arizona Supreme Court, and it must be

appealed within 5 calendar days. *Id.* The Supreme Court must decide the appeal promptly. *Id.*

At least 45 days before the general election, the state must prepare a proof of a sample ballot. *Id.* § 16-461(A). According to the state's affidavits, the state also mails ballots to overseas members of the military 45 days before the general election. Voters can cast early ballots beginning 33 days before the general election; in 2004, early voting began on September 30.

As we construe the data provided by the state, the timeline for the 2004 election was as follows:

Presidential Preference Election	February 3
Filing Deadline for Nader	June 9
Primary Election	September 7
Deadline to Prepare Proof of Sample Ballot	September 18
First Day of Early Voting	September 30
General Election	November 2

B. Proceedings Below

Nader filed his Arizona presidential nomination petitions with the Secretary of State on June 9, 2004. Two Arizona voters then filed an action on June 23 in the Superior Court in Maricopa County, challenging his eligibility. They alleged that his petitions did not provide the required number of valid signatures, that the petitions included signatures forged by

circulators, that some petitions had been circulated by felons, and that the petitions contained falsified addresses of circulators. Nader conceded that the petitions did not meet the signature requirements and on July 2, 2004, withdrew his candidacy for the Arizona ballot.

In August 2004, plaintiffs brought this action for declaratory and injunctive relief, alleging that the residency requirement and the early filing deadline severely burdened the rights of expressive association and political speech of political candidates, potential circulators, and voters, in violation of the First and Fourteenth Amendments, and that neither regulation could survive strict scrutiny. They sought a declaration that Arizona's statutory election scheme was unconstitutional as applied to them and an injunction barring the enforcement of the statutory deadlines in the 2004 election. The district court denied plaintiffs' motion for preliminary injunctive relief.

Both sides moved for summary judgment in January of 2006. The state argued that the restrictions did not impose a severe burden on plaintiffs' rights. It argued further that even if the burden imposed was severe, both the residency and filing deadline requirements should survive strict scrutiny. The state urged that the residency requirement was narrowly tailored to further the state's interest in preventing fraud in the election process, in order to ensure that circulators could be located and subpoenaed in time for petition challenges. With respect to the filing deadline, the state contended that it was

narrowly tailored to further the state's administrative and statutory obligations, given the deadlines related to early voting and sample ballots and the state's schedule for printing the ballots.

In support of its 2006 summary judgment motion, the state submitted affidavits from Joseph Kanefield, the State Election Director, and Karen Osborne, the Director of Elections for Maricopa County, describing the planned schedule for the 2008 election. Osborne explained the procedures that would be utilized for the optical-scan ballots used in Maricopa and Pima Counties, which together represent almost 76% of the state's registered voters. According to Osborne, Maricopa County planned to begin the layout of its general-election ballot as soon as the June 11 filing deadline passed. The first candidates listed on the ballots would be those for the office of presidential elector. The layout of the remainder of the ballot thus depended on the number of candidates for that office. The judges and state initiatives, as well as the county, city, and school ballot propositions, were to be listed on the back of the ballot.

Maricopa County's plan was to print its 2008 ballots in two stages. It would send the back side of the ballot for printing on August 20. The printing of the front side would begin on September 16, after the candidates for the offices listed on the front side were determined in the primary election. The county would receive the completed ballots from the printer no later than September 24, to allow time for testing and

inspecting the ballots, distribution to early voting sites, and mailing for early voting, to begin October 2. The affidavit stated that ballots undergo "Logic" and "Accuracy" tests in each precinct in October.

The only explanation for why the names of the presidential candidates for the general election had to be known in June, three months before the primary, was that the ballot paper had to be ordered about five months before the election. According to the election officials' affidavits, the paper for the ballots would be ordered in late May or early June to ensure availability. The state's motion asserted that if it were to find out later than June that ten presidential electors needed to be added to the ballot, the ballot would require two pages instead of one, and, as a result, Maricopa County would be unable to acquire the additional paper or print the ballots in time. According to the affidavits, however, there are a total of more than 400 state and local offices and dozens of other ballot measures on the general-election ballot. So far as this record indicates, the candidates for all offices, from presidential electors to local officials, are on the same ballot. The state did not explain with any specificity how many offices and measures would appear on a ballot in any given precinct. Nor did the state explain when the nature and number of initiative measures, school bond measures, and other types of ballot measures, which may vary in number and size, need to be known.

The state's affidavits did not fully deal with Arizona's history of moving the filing deadline back.

The state legislature in 1993 moved the filing deadline from a date 10 days after the primary election to a date 75 days before the primary election. *See* Act of Apr. 14, 1993, 1993 Ariz. Sess. Laws ch. 98, sec. 24, § 16-341(C). The legislature in 1999 again moved back the deadline, this time to 90 days before the primary election. *See* Act of May 13, 1999, 1999 Ariz. Sess. Laws ch. 224, sec. 1, § 16-311(A). The record indicates that the 1999 change was made to allow more time for petition challenges, but there is no information in the record about the reasons the deadline was moved in 1993.

Kanefield's affidavit dealt with the history of ballot access by candidates. It declared that since 1994, eight candidates for the state legislature, one candidate for U.S. Representative in Congress, one candidate for the U.S. Senate, and one candidate for governor of the state of Arizona have gained access to the general-election ballot using the procedure provided by section 16-341. Of these offices, only two are voted on statewide. Since the filing deadline was moved in 1993, no independent presidential candidate has achieved a place on Arizona's ballot.

The state also submitted evidence of five criminal prosecutions that the state has pursued for petition fraud. The state did not assert that any of the prosecutions had to do with non-resident circulators.

The district court in June 2006 granted the state's motion for summary judgment and denied plaintiffs' motion for summary judgment. The district

court rejected the state's threshold position that plaintiffs' challenge to the requirements as they applied to the 2004 election was moot, applying the exception to the mootness doctrine for problems "capable of repetition, yet evading review." *See Moore v. Ogilvie,* 394 U.S. 814, 816 (1969) (internal quotation marks omitted) (quoting *S. Pac. Terminal Co. v. Interstate Commerce Comm'n,* 219 U.S. 498, 515 (1911)). The state does not challenge this conclusion on appeal.

With respect to the merits of plaintiffs' claims, the district court viewed the burden on plaintiffs' rights as minimal. It reasoned that even with the residency requirement for petition circulators, there were still several million Arizona residents eligible to vote and hence to circulate petitions. Regarding the filing deadline, the district court observed that states now hold their presidential primaries much earlier in the election year than they did when the Supreme Court held in *Anderson,* 460 U.S. at 806, that an early filing deadline impermissibly burdened independent voters' access to candidates of their choice. The district court reasoned that the Supreme Court's concern about maintaining the ability of an independent to announce a candidacy as a response to developments in major-party candidates' campaigns was less valid than it was when *Anderson* was decided. The district court concluded that the filing deadline provided a "reasonably diligent" candidate enough time to gather the required number of signatures under the standard this court utilized in

Libertarian Party of Washington v. Munro, 31 F.3d 759, 762 (9th Cir. 1994).

The district court ruled both restrictions constitutional, holding that any burden imposed on plaintiffs' rights by the residency requirement was justified by the state's compelling interest in protecting the integrity of the election process, and any burden imposed by the filing deadline was justified by the state's compelling interest in allowing sufficient time to verify signatures, permit challenges to petitions, and print and distribute ballots. Because the court did not find that a severe burden was imposed by the restrictions, it did not hold the state to the heightened requirement of proving the restrictions were narrowly tailored to serve compelling state interests.

On appeal, plaintiffs argue that the court should have applied strict scrutiny to both restrictions because each severely burdens plaintiffs' rights, and that under strict scrutiny, neither is narrowly tailored to further a compelling state interest.

II. Analysis

[1] The Supreme Court has held that when an election law is challenged, its validity depends on the severity of the burden it imposes on the exercise of constitutional rights and the strength of the state interests it serves. In the seminal case of *Anderson,* 460 U.S. at 789, the Court held that, in considering a constitutional challenge to an election law, a court

must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule." The Court struck down Ohio's March filing deadline for independent presidential candidates because the state's "minimal" interests did not justify the "extent and nature" of the burdens imposed by the deadline. *Id.* at 806.

[2] The Court clarified the standard in *Burdick v. Takushi,* 504 U.S. 428, 434 (1992), when it held that the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court. In *Burdick,* the Court upheld a prohibition on write-in voting in Hawaii, holding that the limited burden imposed was justified by Hawaii's interests in preventing factionalism and the manipulation of parties' primary elections through write-in campaigns. *Id.* at 438-40, 441-42. The Court held that an election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest. *See id.* at 434. It held that a state's "important regulatory interests" are usually sufficient to justify election regulations that impose lesser burdens. *Id.* The Court recently reaffirmed these principles in *Washington State Grange v. Washington State Republican Party,* ___ U.S. ___, 128 S. Ct. 1184, 1191-92 (2008).

[3] The leading case in our circuit is *Libertarian Party,* where we upheld the state of Washington's

filing deadline for minor-party candidates that was only weeks before the deadline established for major-party candidates. 31 F.3d at 762, 765. We held that the burden on plaintiffs' rights should be measured by whether, in light of the entire statutory scheme regulating ballot access, "reasonably diligent" candidates can normally gain a place on the ballot, or whether they will rarely succeed in doing so. *Id.* at 761-62 (internal quotation marks omitted) (quoting *Storer v. Brown,* 415 U.S. 724, 742 (1974)). To determine the severity of the burden, we said that past candidates' ability to secure a place on the ballot can inform the court's analysis. *See id.* at 763.

With that legal background, we turn to each of the challenged Arizona election restrictions.

A. Residency Requirement for Petition Circulators

The first provision at issue here is the requirement that petition circulators be residents of the state. Petition circulators must be "qualified to register to vote in [Arizona]." Ariz. Rev. Stat. § 16-321(D). The provision enumerating the requirements for voter registration in turn provides, in relevant part: "Every resident of the state is qualified to register to vote if he . . . [w]ill have been a resident of the state twenty-nine days next preceding the election,. . . ." *Id.* § 16-101(A)(3).

[4] Plaintiffs contend that such a residency requirement unconstitutionally burdens their rights

to speech and association because it interferes with substantially more core political speech than is necessary. The leading decision on qualifications for petition circulators is *Buckley,* 525 U.S. 182, which involved a challenge to Colorado's regulation of initiative-petition circulators. One of the restrictions considered in that case was a requirement that circulators actually be registered to vote in the state. *Id.* at 186. The Court first stated, as it had done in *Meyer v. Grant,* that "[p]etition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change,'" and that First Amendment protection for such interaction is therefore "'at its zenith.'" *Id.* at 186-87 (quoting *Meyer v. Grant,* 486 U.S. 414, 422, 425 (1988)). The Court then determined that the registration requirement imposed a severe burden on the speech rights of individuals involved with the initiative process because it significantly decreased the pool of potential circulators, which in turn limited the size of the audience that could hear the initiative proponents' message. *See id.* at 192 & n.12, 193-96.

[5] The state attempted to justify the burden as necessary to ensure circulators were subject to the state's subpoena power, but the Court found that the state's separate residency requirement achieved the same end, and agreed with the Tenth Circuit's statement that it did so "more precisely." *Id.* at 196-97. The Court expressly did not decide the validity of the separate residency requirement because it was not challenged in that case. *See id.* at 197. (Arizona's

residency provision appears similar to the residency requirement described in *Buckley* and is, of course, less restrictive than the provision invalidated in *Buckley* because the Arizona provision does not require circulators to be actual registered voters. While the district court correctly observed that there remain millions of potential Arizona circulators, the residency requirement nevertheless excludes from eligibility all persons who support the candidate but who, like Nader himself, live outside the state of Arizona. Such a restriction creates a severe burden on Nader and his out-of-state supporters' speech, voting and associational rights. Because the restriction creates a severe burden on plaintiffs' First Amendment rights, strict scrutiny applies. This is a conclusion we believe to be mandated by the Supreme Court in *Buckley*. The Court held in *Buckley* that significantly reducing the number of potential circulators imposed a severe burden on rights of political expression. *See id.* at 194-95.

This conclusion is also supported by two more recent circuit decisions. In *Chandler v. City of Arvada,* the Tenth Circuit held that a city ordinance requiring petition circulators to be residents imposed a severe burden on the speech rights of initiative proponents. 292 F.3d 1236, 1238-39, 1241-42 (10th Cir. 2002). It applied strict scrutiny. The court stated that "[s]trict scrutiny is applicable where the government restricts the overall quantum of speech available to the election or voting process. . . ." *Id.* at 1241-42 (internal quotation marks and citation

omitted). The court specifically ruled that strict scrutiny must be applied when the rights of potential petition circulators are restricted. Quoting from an earlier Tenth Circuit decision, it said that strict scrutiny must be "'employed where the quantum of speech is limited due to restrictions on . . . the available pool of circulators or other supporters of a candidate or initiative, as in [*Buckley*] and *Meyer*.'" *Id.* (quoting *Campbell v. Buckley,* 203 F.3d 738, 745 (10th Cir. 2000)).

In *Krislov,* the Seventh Circuit held that an in-district residency requirement, which operated as an in-state residency requirement for a candidate for the U.S. Senate, severely burdened candidates' rights to association and ballot access. 226 F.3d at 855-56, 857, 860-62. The court explained,

> What is particularly important in this case [in assessing the severity of the burden] . . . is the number of people the . . . requirements exclude from gathering signatures and thus disseminating the candidates' political message. . . . [The residency requirement] places a substantial burden on the candidates' First Amendment rights by making it more difficult for the candidates to disseminate their political views, to choose the most effective means of conveying their message, to associate in a meaningful way with the prospective solicitors for the purposes of eliciting political change, to gain access to the ballot, and to utilize the endorsement of their candidacies which can be implicit in a solicitor's

> efforts to gather signatures on the candidates' behalf.

Id. at 860, 862 (citing *Buckley,* 525 U.S. at 193 n. 15).

A brief Eighth Circuit opinion came to the opposite conclusion and upheld a residency requirement for initiative-petition circulators. *See Initiative & Referendum Institute v. Jaeger,* 241 F.3d 614, 617 (8th Cir. 2001). *Krislov* had been decided a few months earlier, but *Jaeger* did not cite it. The Tenth Circuit in *Chandler* did cite *Jaeger* and disagreed with it. *See Chandler,* 292 F.3d at 1244. We do not find *Jaeger* persuasive.

[6] The state contends here that if the standard is strict scrutiny, then the restriction is justified by the state's compelling interest in preventing fraud in the election process. It points to the evidence it presented of past election fraud in Arizona. A state's interest in ensuring the integrity of the election process and preventing fraud is compelling. *See Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006) (per curiam). We therefore agree with Arizona that the state's interest in preventing election fraud is a compelling one. The state, however, bears the burden of proving that a regulation is narrowly tailored. *See ACLU of Nev. v. Heller,* 378 F.3d 979, 997 (9th Cir. 2004).

The state contends that this restriction is narrowly tailored to ensure that circulators are subject to the state's subpoena power, and that the state can locate them within the ten-day period allotted for petition challenges. Plaintiffs argue that requiring

circulators to submit to jurisdiction by agreement would achieve the same end and would be more narrowly tailored to further the state's interest in preventing fraud.

[7] Federal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result. *See Chandler,* 292 F.3d at 1242-44 (holding that city residency requirement was "substantially broader than necessary" to ensure the integrity of the petition process in part because the city could instead require circulators to submit to jurisdiction of the city for subpoena enforcement); *Krislov,* 226 F.3d at 866 n. 7 (invalidating residency requirement and suggesting agreement to submit to jurisdiction as permissible restriction to further state's interest in preventing fraud); *Frami,* 255 F. Supp. 2d at 970 (noting that requiring petition circulators to agree to submit to jurisdiction for subpoena enforcement was a "less onerous method[]" than a residency requirement for serving the state's interest in ensuring circulators were subject to the state's jurisdiction). *Cf. Kean v. Clark,* 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999) (holding that a residency requirement was narrowly tailored, but without considering any "consent to jurisdiction" alternative).

[8] The state responds that petition circulators could conceivably be spread throughout the country,

and that given the narrow timeframe for petition challenges in Arizona, such a "consent to jurisdiction" system would be unworkable. The state does not provide any evidence, however, to support this contention, observing only that professional petition circulators can be "nomadic." Nor did the state ever contend that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents. *See Krislov,* 226 F.3d at 866 n. 7 ("[I]f the use of non-citizens were shown to correlate with a high incidence of fraud, a State might have a compelling interest in further regulating noncitizen circulators."); *Frami,* 255 F. Supp. 2d at 970 (holding a residency requirement was not narrowly tailored to serve the state's interest in preventing fraud because defendant had "not even alleged that the state has experienced problems in the past with non-resident petition circulators or that such circulators are more likely to engage in fraud than in-state . . . circulators.").

[9] We conclude that the state did not meet its burden of showing that this residency requirement is narrowly tailored to further the state's compelling interest in preventing fraud. On the basis of the record before us, the requirement cannot be sustained.

B. Filing Deadline

The second provision at issue is the requirement that petitions be filed 90 days before the primary

election. Plaintiffs argue that this deadline imposes a severe burden on their speech, association and voting rights and that the state has not shown that the deadline is narrowly tailored to further a compelling interest.

[10] In *Anderson*, the Supreme Court struck down Ohio's March filing deadline for an independent presidential candidate's nomination petition. 460 U.S. at 806. In evaluating the severity of the burden imposed, the Court observed that the deadline deprived independent candidates of their ability to respond to developments in the course of the campaigns of the major-party candidates. *See id.* at 791-92, 791 n. 12. The Court observed that particular independent candidacies, and voter support for those candidacies, sometimes occur as a reaction to the particular nominees of the major parties. *See id.* It also found that collecting 5,000 signatures far in advance of the general election was difficult, since interest levels were low and volunteers were difficult to recruit. *See id.* at 792. The Court concluded that none of the state's asserted interests justified the "extent and nature" of the burden imposed by the March filing deadline. *Id.* at 806.

In this case, the district court concluded that *Anderson* was not controlling. The court reasoned that Arizona's 2004 presidential preference election was held well in advance of the filing deadline, that the major parties' candidates and platforms were well-known, and the level of public interest was high by then. The district court dismissed the significance

of the concerns in *Anderson* because they were not present in the 2004 election.

The 2004 election, however, may not have been representative of future elections, where the major party candidates may not be determined so far in advance of the filing deadline. *Anderson* remains binding Supreme Court authority. We conclude that the concerns expressed in *Anderson* may well remain significant, and in any event, we are not free to disregard them.

[11] The historical evidence of ballot access in Arizona further supports this conclusion. *See Libertarian Party,* 31 F.3d at 763 (looking to historical experience to support conclusion that ballot-access scheme did not severely burden minor-party candidates' rights). Since 1993, when Arizona changed its filing deadline from 10 days after the primary election to 75 days before the primary election, no independent presidential candidate has appeared on Arizona's ballot. This experience suggests that the regulations impose a severe burden that has impeded ballot access.

The state tries to maintain that this record supports the early deadline for presidential candidates, because independent candidates for other offices have gained ballot access. Yet candidates for president are national candidates and thus situated differently from candidates for state offices, or even other federal offices in Arizona; presidential candidates in Arizona are required to file more signatures

than candidates for local offices. Evidence regarding independent candidacies for other offices is not particularly persuasive and certainly not conclusive in this case.

The state relies upon *Libertarian Party*. There we upheld a Washington statute requiring minor-party candidates to obtain 200 signatures for statewide offices or 25 signatures for other offices by July 4 of the election year. *Libertarian Party,* 31 F.3d at 760-61. The case thus involved a comparatively small number of signatures and a date closer to the major parties' conventions. For those reasons we concluded that only a de minimis burden was imposed. *See id.* at 763. We explained why the restrictions were much less burdensome than those in *Anderson*. *See id.* at 762. We pointed out that collecting such a small number of signatures just four to five weeks before the selection of major-party candidates was not particularly difficult. *See id.* We also deemed it significant that the plaintiffs challenging the regulation had all been able to announce and file on time, and that they could not identify any candidates who had been denied ballot access because of Washington's procedures. *Id.* at 763.

In *Anderson,* by contrast, where the plaintiff was forced to file petitions in March, five months before the major-party candidates were to be decided, 460 U.S. at 790-91, and had been unable to get his name on the ballot, *id.* at 782-83, the early filing deadline was struck down, *id.* at 806. Nader's predicament is like that of the plaintiff in *Anderson*. Here, the

signature requirement is greater and the deadline tighter than in *Libertarian Party.* Unlike the candidates in *Libertarian Party,* independent presidential candidates in Arizona have not been able to get on the ballot. The Sixth Circuit's opinion in *Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579, 590-91 (6th Cir. 2006), contains a good discussion of the various circuit court decisions in cases considering and striking down early filing deadlines in state elections.

[12] For these reasons we must conclude that the Arizona deadline imposes a severe burden on plaintiffs' rights. Because a severe burden is imposed, strict scrutiny applies to the filing deadline as well. *See Anderson,* 460 U.S. at 792, 795, 806.

[13] The state next contends that even under strict scrutiny, the filing deadline is constitutional because it is necessary in order for the state to meet its various deadlines for petition challenges, sample ballots, early voting ballots and overseas military personnel, as well as for the layout and printing of ballots.

[14] When we examine the timeline, however, together with the relatively small impact of the presidential election on the overall length of Arizona's general-election ballots, we cannot say that the state has justified the early filing deadline. The state asserts that Arizona's general election ballots include over 400 different federal, state, and local elected offices and dozens of local ballot measures. The state contends in effect that it can accommodate all the

other offices and initiatives, but not the addition of ten electors for the office of President. This does not appear on its face to be an internally consistent position. The state has not explained when and how it learns of the number of other offices and initiatives that must be placed on the general-election ballot. Presumably, the results of the September primary election would have some effect on the length of the general-election ballot as well, but the state has not documented the process in sufficient detail to determine what effect it would or would not have. The state made the conclusory assertion that it must order the ballot paper by early June to ensure availability, but it has not provided documentation or any other evidence supporting this conclusion.

[15] There is thus no satisfactory explanation in the record as to why the state needs the full amount of time between the filing deadline for independent candidates, which in 2004 fell on June 9, and its first statutory deadline of printing a sample ballot 45 days before the general election, which in 2004 fell on September 18, to prepare the ballots for the general election. In light of the state's ability to put together the general-election ballot after the primary in September, and its failure adequately to demonstrate why the petition filing deadline must be so early, the state has on this record failed to show that the deadline is narrowly tailored to further compelling administrative needs.

Conclusion

Election cases are difficult. The historical background for such litigation changes rapidly. The district court was faced with a serious challenge to ballot-access requirements that have proved difficult for courts to evaluate, given both the state's compelling interests in preventing fraud and providing orderly election administration, and the Constitution's mandate for free political expression and participation that require such ballot-access restrictions to survive strict judicial scrutiny. Although the district court did not agree with plaintiffs that the requirements constituted serious impediments to the exercise of their constitutional rights, we conclude that the burdens are serious and the restrictions are not sufficiently narrowly tailored to serve the state's compelling interests. The state was given every opportunity to meet the heavy burden that the district court or a higher court might eventually determine that it must shoulder under strict scrutiny. On the basis of the record before us, the state did not do so.

The judgment of the district court is **REVERSED** and **REMANDED** with instructions to enter summary judgment in favor of plaintiffs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Ralph Nader, et al., Plaintiffs, vs. Janice Brewer, in her official capacity of Secretary of State, Defendant.	No. CV-04-1699-PHX-FJM **ORDER**

The court has before it defendant's Motion for Summary Judgment (doc. 45), plaintiffs' Motion for Summary Judgment (doc. 47) and Memorandum (doc. 56), defendant's Response (doc. 49) and Reply (doc. 55), and plaintiffs' Response and Reply (doc. 51).

I

Ralph Nader, an independent candidate for President in 2004, and Donald Daien, a registered Arizona voter who supported Nader, brought this action alleging that Arizona's ballot access statutes deprive them of their First and Fourteenth Amendment rights to free speech and association. Nader announced his candidacy on February 22, 2004. On June 9, 2004, he filed nomination petitions with the Secretary of State of Arizona, containing approximately 21,185 signatures. Thereafter, two voters filed

an action in the Superior Court of Arizona in Maricopa County, challenging Nader's eligibility for the ballot on the basis that Nader failed to file a sufficient number of valid signatures, Nader's petitions included forgeries by circulators, some of Nader's petitions were circulated by felons, and certain circulators falsified their addresses. At the time set for trial, Nader advised the court that he was withdrawing his petitions and his candidacy in Arizona because he failed to collect enough valid signatures. Based on Nader's statement, the superior court entered judgment enjoining the Secretary of State and county election officials from placing Nader and his electors on the ballot.

Plaintiffs then brought this action challenging Arizona's election statutes as unconstitutional. We denied plaintiffs' application for preliminary injunctive relief and the election was held without Nader. Plaintiffs now seek declaratory relief that Arizona election laws are unconstitutional to the extent that they (1) require those who circulate nomination petitions on behalf of presidential candidates to be qualified to vote in Arizona, and (2) impose an early deadline for filing nomination petitions far in advance of either party's national convention.[1]

---

[1] Our resolution of these issues is made on a very limited record. Plaintiffs did not file a statement of facts, but instead chose to rely on the State's submission. Plaintiffs offered no evidence to establish the significance of the burden imposed on them by the challenged statutes.

Independent candidates for public office may get on the ballot in Arizona by filing nomination petitions containing a requisite number of signatures. A.R.S. § 16-341. In a national presidential election, the petitions are filed for the office of presidential elector, rather than for the candidate. *Id.* at § 16-341(G). The number of signatures required for an independent presidential candidate to get on the ballot is 3% of registered voters who are not registered as members of a recognized political party. A.R.S. § 16-341(E). In 2004, 14,694 signatures were required. Nomination papers for all candidates for presidential elector, whether they represent a candidate from a recognized party or an independent candidate, are due no fewer than 90 days before the primary election. A.R.S. §§ 16-311(A), 16-341(C). In 2004, the filing deadline was June 9, 2004. Arizona law also provides that any person who is "qualified to register to vote" in Arizona may circulate nomination petitions. A.R.S. §§ 16-315(B), 16-321(D).

II

A

Defendant contends that we should dismiss for lack of standing and mootness. Parties seeking to invoke the jurisdiction of federal courts must show that they have standing to sue within the meaning of Article III. Standing has essentially three components: a plaintiff must show that he has suffered an "injury in fact," that the challenged action caused the

injury, and that the injury can likely be redressed by the cause of action. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992). Nader contends that his First Amendment rights to free speech and free association are violated by A.R.S. §§ 16-315(B) and 16-321(D), which prohibit him from circulating petitions in Arizona because he is not an Arizona resident. Plaintiffs contend that their vote, and their associational and speech rights, are diminished by the limits imposed on ballot choices caused by early filing deadlines. Because the "injury in fact," causation, and redressibility components were satisfied, plaintiffs had standing to bring this action.

Although the election was held without Nader's name on the ballot, the passage of an election does not necessarily render an election-related challenge moot. Such challenges may fall within the "capable of repetition yet evading review" exception to the mootness doctrine. *See Moore v. Ogilvie,* 394 U.S. 814, 816, 89 S. Ct. 1493, 1494 (1969). Where there is a challenge to the validity of a statutory provision that will continue to operate past the election in question and will burden future candidates or voters in future elections, a "continuing controversy" remains. *Id.* "[T]he laws in question remain on the books, and [plaintiff] has standing to challenge them as a member of the class of people affected by the presently written statute." *Schaefer v. Townsend,* 215 F.3d 1031, 1033 (9th Cir. 2000) (quoting *Dunn v. Blumstein,* 405 U.S. 330, 333 n.2, 92 S. Ct. 995, 998 n.2 (1972)). Because the statutes remain unchanged, this

case is capable of repetition. And given the very tight time deadlines imposed by state election law on challenges to nomination petitions, see A.R.S. § 16-351, this case may yet evade review. The action, thus, is not moot.

B

Each provision of a state's election code inevitably affects the right of association and the right to vote. *Anderson v. Celebreeze,* 450 U.S. 780, 788, 103 S. Ct. 1564, 1569-70 (1983). However, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* (quoting *Storer v. Brown,* 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974)). Associating for the purpose of placing a candidate on the ballot is protected by the First Amendment; indeed, the circulation of petitions for ballot access "involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant,* 486 U.S. 414, 421-22, 108 S. Ct. 1886, 1892 (1988).

In evaluating the constitutionality of ballot access regulations, a court must carefully weigh competing factors.

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to

> vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson, 450 U.S. at 789, 103 S. Ct. at 1570.

A law that severely restricts First Amendment rights will pass muster only if it is narrowly tailored to achieve a compelling state interest. *Libertarian Party v. Munro,* 31 F.3d 759, 761 (9th Cir. 1994) (citing *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S. Ct. 2059, 2063 (1992)). If the burden is slight, however, the procedures will survive as long as they are rationally related to a legitimate interest. *Id.* In evaluating the nature and magnitude of the burden that Arizona's election procedures impose on independent candidates, we must examine the entire regulatory scheme. *Id.* at 761-62. From that vantage, "[t]he question is whether 'reasonably diligent' [independent] candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Id.* at 762 (quoting *Storer,* 415 U.S. at 742, 94 S. Ct. at 1285). Plaintiffs have the burden of showing that the challenged laws "seriously restrict the availability of political opportunity." *Id.*

1.

Plaintiffs first challenge the constitutionality of A.R.S. §§ 16-315(B) and 16-321(D), which provide that those who circulate nomination petitions on behalf of political candidates must "be qualified to register to vote" in Arizona.[2] A person is qualified to register to vote if he or she is an Arizona resident, a United States citizen, at least 18 years old by the next general election, not a convicted felon, and an Arizona resident at least 29 days before the election. A.R.S. § 16-101.

Plaintiffs' challenge centers on the requirement that circulators must be Arizona residents. They contend that the residency requirement restricts political expression by limiting the number of voices available to convey their message, and therefore limits the size of the audience they can reach. Moreover, the restriction makes it less likely that an independent candidate will gather the signatures required to get on the ballot, thus limiting the ability to influence public political discussion. Plaintiffs also argue that their First Amendment right to political and expressive association is violated because they are not able to advocate or vote for the candidates they support.

---

[2] While the Supreme Court has struck down actual voter registration as a requirement to circulate petitions, it had no occasion to address residence requirements. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 119 S. Ct. 6361 (1999).

A state has a compelling interest in protecting the integrity and fairness of the electoral process and in "ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson v. Freeman,* 504 U.S. 191, 199, 112 S. Ct. 1846, 1852 (1992). Here, the State asserts that "[b]y requiring circulators to be Arizona residents, [it] may locate and subpoena circulators to answers questions or, in the event of fraud, to enforce its laws." *Defendant's Motion for Summary Judgment* at 15. The State contends that a history of circulator fraud in Arizona elections shows the necessity of the residency requirement. *DSOF* ¶ 44.

Arizona has an expedited process to challenge nomination petitions. First, an elector must file an action within 10 days of the petition filing deadline. A.R.S. § 16-351(A). The candidate benefits from a presumption that the petitions are valid because the circulator attests to the validity of each signature. Arizona places the burden on the challenging party to identify by petition number and by line each signature alleged to be invalid and to assert the basis for the challenge. *Id.* In order to effectively identify and support petition challenges, an elector may be required to identify and locate circulators, and secure their testimony. Failure to adequately specify the basis for the challenge will result in the dismissal of the action. *Id.*

According to the State, identifying issues, locating circulators and securing their testimony in just 10 days would be virtually impossible if circulators could

not be readily located and made available to testify, particularly given that professional circulators oftentimes operate as "migratory workers," leaving the state as soon as the petition drive is completed. *See McDowell Mountain Ranch Land Coalition v. Vizcaino,* 190 Ariz. 1, 4, 945 P.2d 312, 315 (1997).[3]

We agree that the State has a compelling interest in protecting the petition process from fraud and abuse, and to ensure the State's subpoena power in order to accomplish these goals. Under Arizona's statutory framework, an elector would be hard pressed to raise an effective challenge to a nomination petition without access to the person who collected the contested signatures. Given the fact that independent candidates have access to approximately 3.7 millions Arizona residents who are eligible to circulate petitions, *DSOF* ¶ 7, any interference with plaintiffs' right to political expression is limited and justified by the State's compelling interest in protecting the integrity of the election process.

Plaintiffs argue that Arizona's statutory scheme is not narrowly tailored to satisfy the State's interests. Plaintiffs claim that because § 16-101(A)(3) only requires residency 29 days before an election, a circulator need not be a resident at the time of a petition drive, thereby defeating the State's interests in ensuring subpoena power at the time of a petition

---

[3] The Nader campaign contracted with JSM, Inc., a Florida corporation, to circulate petitions in Arizona. *DSOF, Exhibit 8.*

challenge. But plaintiffs ignore the introductory sentence of A.R.S. § 16-101(A), which provides that, "[e]very *resident* of the state is qualified to vote if. . . ." (Emphasis added). The first qualification for voter eligibility under § 16-101(A) is that a person be a "resident." Subparagraph (3) imposes the additional requirement that a resident must have been a resident for 29 days before the election. A person must be an Arizona resident at the time of the petition drive in order to circulate a petition.

We conclude that Arizona's circulator residency requirement does not violate plaintiffs' First Amendment rights. The harm to plaintiffs' rights is minimal, if at all, while the State's interest in the integrity of the process is substantial.

2.

Plaintiffs next challenge statutes that require nomination petitions of independent candidates to be filed not less than 90 days before the primary election. *See* A.R.S. §§ 16-341(C), 16-311(A). In 2004, the filing deadline was June 9th. Plaintiffs contend that this deadline discriminates against independent candidates who are required to identify themselves and file nomination petitions before the major political parties have chosen their candidates for the general election. They argue that Arizona's June 9th filing deadline imposes an unconstitutional burden on the speech and associational rights of independent candidates and voters who might support them.

In *Anderson,* the Supreme Court found a mid-March filing deadline unconstitutional because it could not be justified by the state's asserted interest in protecting political stability. 450 U.S. 780, 805-06, 103 S. Ct. 1564, 1579 (1983). The Court examined the burdens imposed on speech and associational rights by an early filing deadline, and noted that issues and candidates do not remain static over the course of an election campaign. *Id.* at 790, 103 S. Ct. at 1570. Imposing an early filing deadline deprives alternative political parties of the opportunity to recruit and nominate candidates, and deprives them of the ability to react to events occurring after the filing deadline. An early filing deadline may require candidates to gather signatures at a time when the election is remote and voters are generally uninterested in the campaign. *Id.* at 792, 103 S. Ct. at 1572.

Given these burdens on plaintiffs' rights, we now turn to the State's justifications for its filing deadline. The State contends that adequate time must be available between the petition deadline and the general election to allow challenges to the validity of petitions to be raised and adjudicated. The State contends that the deadline is necessary to allow sufficient time to print and distribute ballots that will contain the names of all the candidates. The ballots must be printed well before the general election so that they can be distributed to registered voters who vote by absentee or early ballot.

In 2004, Arizona's filing deadline fell only 146 days before the general election – 83 days closer than

the deadline in *Anderson*. Early voting begins in Arizona 33 days before the general election, A.R.S. § 16-545, and ballots must be mailed to members of military overseas at least 45 days before the election. With early voting, the period between Arizona's filing deadline and the date voting begins is only 113 days – less than half the period considered in *Anderson*. After the filing deadline and during this 113-day period, Arizona law provides for challenges to a candidate's petitions or his qualifications for office. A.R.S. § 16-351. This challenge process must be completed before ballots can be printed.

The State asserts that the presidential primary process has changed since *Anderson* was decided more than 20 years ago. In 2004, ten states held their primary elections on "Super Tuesday," which fell on March 2nd. Arizona's presidential preference election was held on February 3rd, well before the June filing deadline. As the Seventh Circuit noted with respect to the 2004 election, "[l]ong before the June deadline it was not only certain who the major parties' candidates would be but their positions were well known, the candidates were campaigning vigorously, there was a high level of public interest in the campaign, [and] Nader himself had been campaigning since February." *Nader v. Keith,* 385 F.3d 729, 736 (7th Cir. 2004). Thus, many of the concerns raised in *Anderson* do not have the same significance today.

Here, Nader declared his candidacy on February 22, 2004, giving him 107 days to collect the requisite

number of signatures. Yet Nader did not begin circulating petitions until April, and waited until just two weeks before the deadline to collect more than 90 percent of his signatures. "The question is whether 'reasonably diligent' minor party candidates can normally gain a place on the ballot, or if instead they only rarely will succeed." *Libertarian Party v. Munro,* 31 F.3d at 762 (citing *Storer,* 415 U.S. at 742, 94 S. Ct. at 1285). Nader's failure to get on the ballot was caused by his failure to start earlier.

We conclude that Arizona's filing deadline is not more burdensome than necessary to support its compelling interests in allowing sufficient time to verify signatures, allow for challenges to petitions, and to print and distribute ballots for early and oversees voting. It is thus constitutional.[4]

III

IT IS ORDERED GRANTING defendant's Motion for Summary Judgment (doc. 45). **IT IS FURTHER ORDERED DENYING** plaintiffs' Motion for Summary Judgment (doc. 47).

---

[4] We note in passing that the Arizona Supreme Court reached the same conclusion. *See Browne v. Bayless,* 202 Ariz. 405, 46 P.3d 416 (2002), *cert. denied,* 537 U.S. 1088, 123 S. Ct. 696 (2002).

DATED this 8th day of June, 2006.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RALPH NADER; DONALD N. DAIEN, Plaintiffs-Appellants, v. JANICE BREWER, in here [sic] official capacity as Secretary of State of Arizona, Defendant-Appellee.	No. 06-16251 D.C. No. CV-04-01699-FJM District of Arizona, Phoenix ORDER (Filed Aug. 15, 2008)

Before: SCHROEDER, CLIFTON, and CALLAHAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX D

A.R.S. § 16-101. *Qualifications of registrant; definition*

A. Every resident of the state is qualified to register to vote if he:

1. Is a citizen of the United States.

2. Will be eighteen years of age or more on or before the date of the regular general election next following his registration.

3. Will have been a resident of the state twenty-nine days next preceding the election, except as provided in section 16-126.

4. Is able to write his name or make his mark, unless prevented from so doing by physical disability.

5. Has not been convicted of treason or a felony, unless restored to civil rights.

6. Has not been adjudicated an incapacitated person as defined in section 14-5101.

B. For purposes of this title, "resident" means an individual who has actual physical presence in this state, or for purposes of a political subdivision actual physical presence in the political subdivision, combined with an intent to remain. A temporary absence does not result in a loss of residence if the individual has an intent to return following his absence. An individual has only one residence for purposes of this title.

A.R.S. § 16-311. *Nomination papers; filing; definitions*

A. Any person desiring to become a candidate at a primary election for a political party and to have the person's name printed on the official ballot shall be a qualified elector of such party and, not less than ninety nor more than one hundred twenty days before the primary election, shall sign and cause to be filed a nomination paper giving the person's actual residence address or description of place of residence and post office address, naming the party of which the person desires to become a candidate, stating the office and district or precinct, if any, for which the person offers the person's candidacy, stating the exact manner in which the person desires to have the person's name printed on the official ballot pursuant to subsection G, and giving the date of the primary election and, if nominated, the date of the general election at which the person desires to become a candidate. A candidate for public office shall be a qualified elector at the time of filing and shall reside in the county, district or precinct which the person proposes to represent.

* * *

A.R.S. § 16-321. *Signing and certification of nomination petition*

A. Each signer of a nomination petition shall sign only one petition for the same office unless more than one candidate is to be elected to such office, and in that case not more than the number of nomination

petitions equal to the number of candidates to be elected to the office. A signature shall not be counted on a nomination petition unless the signature is upon a sheet bearing the form prescribed by section 16-314.

B. For the purposes of petitions filed pursuant to sections 16-312, 16-313, 16-314 and 16-341, each signer of a nomination petition shall be a voter who at the time of signing is a registered voter in the electoral district of the office the candidate is seeking.

C. If an elector signs more nomination petitions than permitted by subsection A of this section, the earlier signatures of the elector are deemed valid, as determined by the date of the signature as shown on the petitions. If the signatures by the elector are dated on the same day, all signatures by that elector on that day are deemed invalid. Any signature by that elector on a nomination petition on or after the date of the last otherwise valid signature is deemed invalid and and shall not be counted.

D. The person before whom the signatures were written on the signature sheet shall be qualified to register to vote in this state pursuant to section 16-101 and shall verify that each of the names on the petition was signed in his presence on the date indicated, and that in his belief each signer was a qualified elector who resides at the address given as the signer's residence on the date indicated and, if for a partisan election, that each signer is a member of the party from which the candidate is seeking nomination, or the signer is a member of a political party

that is not entitled to continued representation on the ballot pursuant to section 16-804 or the signer is registered as independent or no party preferred. The way the name appears on the petition shall be the name used in determining the validity of the name for any legal purpose pursuant to the election laws of this state. Signature and handwriting comparisons may be made.

A.R.S. § 16-341. *Nomination petition; method and time of filing; form; qualifications and number of petitioners required*

A. Any qualified elector who is not a registered member of a political party that is recognized pursuant to this title may be nominated a candidate for public office otherwise than by primary election or by party committee pursuant to this section.

B. This article shall not be used to place on the general election ballot the name of a political party which fails to meet the qualifications specified in section 16-802 or 16-804, or the name of any candidate representing such party or the name of a candidate who has filed a nomination petition in the immediately preceding primary election and has failed to qualify as the result of an insufficient number of valid signatures.

C. A nomination petition stating the name of the office to be filled, the name and residence of the candidate and other information required by this

section shall be filed at the same time and with the same officer with whom primary nomination papers and petitions are required to be flied as prescribed in section 16-311. The petition shall be signed only by voters who have not signed the nomination petitions of a candidate for the office to be voted for at that primary election.

D. The nomination petition shall be in substantially the following form:

"The undersigned, qualified electors of ___ county, state of Arizona, do hereby nominate ___, who resides at ___ in the county of ___ as a candidate for the office of ___, at the general (or special, as the case may be) election to be held on the ___ day of ___, ___.

I hereby declare that I have not signed the nomination petitions of any candidate for the office to be voted for at this primary election, and I do hereby select the following designation under which name the said candidate shall be placed on the official ballot (here insert such designation not exceeding three words in length as the signers may select)."

E. The nomination petition shall conform as nearly as possible to the provisions relating to nomination petitions of candidates to be voted for at primary elections and shall be signed by at least the number of persons who are registered to vote determined by calculating three per cent of the persons who are registered to vote of the state, county, subdivision or district for which the candidate is nominated who are not members of a political party that is qualified to be

represented by an official party ballot at the next ensuing primary election and accorded representation on the general election ballot.

F. The percentage of persons who are registered to vote necessary to sign the nomination petition shall be determined by the total number of registered voters from other than political parties that are qualified to be represented by an official party ballot at the next ensuing primary election and accorded representation on the general election ballot in the state, county, subdivision or district on March 1 of the year in which the general election is held. Notwithstanding the method prescribed by subsection E of this section and this subsection for calculating the minimum number of signatures necessary, any person who is registered to vote in the state, county, subdivision or district for which the candidate is nominated is eligible to sign the nomination petition without regard to the signer's party affiliation.

G. For the purposes of this section, a nomination petition for the office of presidential elector shall include a group of names of candidates equal to the number of United States senators and representatives in Congress from this state instead of separate nomination petitions for each candidate for the office of presidential elector. A valid signature on a petition containing a group of presidential electors candidates is counted as a signature for the nomination of each of the candidates. The presidential candidate whom the candidates for presidential elector will represent shall designate in writing to the secretary of state the

names of the candidates who will represent the presidential candidate before any signatures for the candidate can be accepted for filing.

H. A person who files a nomination paper pursuant to this section for the office of president of the United States shall designate in writing to the secretary of state at the time of filing the name of the candidate's vice-presidential running mate, the names of the presidential electors who will represent that candidate and a statement that is signed by the vice-presidential running mate and the designated presidential electors and that indicates their consent to be designated. A nomination paper for each presidential elector designated shall be filed with the candidate's nomination paper. The number of presidential electors shall equal the number of United States senators and representatives in Congress from this state.

I. A candidate who does not file a timely nomination petition that complies with this section is not eligible to have the candidate's name printed on the official ballot for that office. The filing officer shall not accept the nomination paper of a candidate for state or local office unless the candidate provides or has provided all of the following:

1. The nomination petition required by this title.

2. A political committee statement of organization or the five hundred dollar threshold exemption statement for that office.

3. The financial disclosure statement as prescribed for candidates for that office.